The Islamic Law

AND

ITS INTRODUCTION IN PAKISTAN

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CHAPTER I

THE ISLAMIC LAW

It is an irony of fate that, now-a-days, the demand for the enforcement of Islamic Law has come to be surrounded by such a thick mist of misgivings that a mere reference to it, *even in a Muslim country* like Pakistan, raises a storm of criticism. Thus, for instance, the questions are asked: Can a centuries-old legal system be adequate to fulfil the requirements of our modern state and society? Is it not absurd to think that the laws which had been framed under certain particular circumstances in bygone days, can hold good in every age and every clime? Do you seriously propose to start chopping off the hands of thieves and flogging human beings in this modern, enlightened age? Will our markets again abound in slaves and deal in the sale and purchase of human beings as chattels and play-things? Which particular sect's legal system is going to be introduced here? What about the non-Muslim minorities who will never tolerate the dominance of the Muslim religious law and will resist it with all the force at their command? One has to face a volley of such questions while discussing the problem, and, strangely enough, not from non-Muslims but from the Muslim educated elite!

To be sure, these questions are not the outcome of any antagonism towards Islam but mostly of sheer ignorance which must quite naturally breed suspicion. And, to our utter misfortune, ignorance abounds in our

ranks. We have people who are otherwise educated but who know practically nothing about their great ideology and their glorious heritage. No wonder, then, that they labour under strong prejudices.

This state of degradation, however, has not come as a bolt from the blue ; it is, rather, the culmination of a gradual process of decay spread over many centuries. Commencing with stagnation in the domains of knowledge and learning, research and discovery and thought and culture, it finally culminated in our political breakdown, making many a Muslim country the slave of non-Muslim imperialist powers. Political slavery gave birth to inferiority-complex and the resultant intellectual serfdom eventually swept the entire Muslim world off its feet, so much so that even those Muslim countries which were able to retain their political freedom could not escape its evil influences. The ultimate consequence of this evil situation was that when Muslims woke up again to the call of progress, they were incapable of looking at things except through the coloured glasses of Western Thought. Nothing which was not Western could inspire confidence in them. Indeed, the adoption of Western Culture and Civilization and aping the West even in the most personal things became their craze. Eventually, they succumbed totally to the slavery of the West.

This trend towards Westernism was also the result of the disappointment which came to the nation from the side of the Muslim religious leaders. Being themselves the victims of the wide-spread degeneration that had engulfed the entire Muslim world, they were incap-

able of initiating any constructive movement or taking any revolutionary step which could combat the evils afflicting the Muslim society. Quite naturally, this disappointment turned the discontented Muslims towards that system of life which had the glamour of being successful in the modern world. Thus they succumbed to the onslaughts of modern thought, adopted the new culture of the West and began to ape blindly Western modes and manners. Slowly but surely, the religious leaders were pushed into the background and were replaced, as regards power and control over the people, by men bereft of all knowledge of their religion and imbued only with the spirit of modern thought and Western ideals. That is why we find that many a Muslim country has, in the recent past, either completely abrogated the Islamic Law or confined its operation to the domain of purely personal matters only—that is, a position conferred on the non-Muslims in a truly Islamic state.*

*The first country where the abrogation of Islamic Law started was India, although the *Shari'ah* continued in force long after the British had come into power. So much so that the penalty of severing the hand of a habitually hardened thief was awarded as late as 1791 A.D. Thereafter the process of suppression began, till at last by the middle of the nineteenth century, the whole of the *Shari'ah* had been abrogated by the British, excepting of course injunctions regarding purely personal matters like marriage, divorce, etc. Other countries where Muslims themselves were in power, instead of feeling offended by this step of the British, so to say took their cue from this tragedy in India and the leading part in this transition was taken by the Muslim Native States of India. In 1884, Egypt changed over from her own laws to *Code Napoleon* leaving only matters of divorce, marriage and inheritance to the jurisdiction of the *Qadis*. In the twentieth century Turkey and Albania took a further

[*Contd.*

In all those Muslim countries, which suffered from foreign domination, the leadership of political and cultural movements fell into the hands of those who were shorn of all Islamic background. They adopted the creed of Nationalism, directed their efforts towards the cause of *national* independence and prosperity along secular lines and tried to copy, step by step, the advanced nations of this age. So, if these gentlemen feel vexed with the demand for Islamic Constitution and Islamic Laws, it is quite natural for them. It is also natural for them to sidetrack or suppress the issue, as they are ignorant of even the A.B.C. of the Islamic *Shari'ah*. Their education and intellectual development has alienated them so completely from the spirit and the structure of Islamic ideology that it is, at least for the moment, very difficult for them to understand such demands.

As regards the Muslim religious leadership, it has in no way fared better, because our religious institutions are tied to the intellectual atmosphere of the fifth century A.H., as a consequence of which they have not

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lead over their fellow Muslim states and not only proclaimed themselves to be completely secular States but also remodelled all their laws on the pattern of those of Italy, France, Switzerland and Germany, making such inroads on Muslim personal law itself as no non-Muslim state would dare do. Albania led the way by penalizing polygamy and Turkey followed her by changing the mandatory provisions of the Holy Qur'an in respect of divorce and inheritance. There now remain only Afghanistan and Saudi Arabia where the *Shari'ah* is accepted as the State Law though even there the spirit of the *Shari'ah* has long since disappeared and the whole of *Shari'ah* too is not being enforced.

been able to produce such leaders of Islamic thought and action as should be capable of administering the affairs of a modern state in the light of Islamic principles. This is the situation prevailing throughout the Muslim world and is, indeed, a very real obstacle facing the Islamic countries in their march towards the goal of Islamic renaissance.

Notwithstanding certain similarities of situation the case of Pakistan is not, however, the same as that of other Muslim countries. This is so because it has been achieved exclusively with the object of becoming the homeland of Islam. For the last ten years,* we have been ceaselessly fighting for the recognition of the fact that we are a separate nation by virtue of our adherence to Islam. We have been proclaiming from housetops that we have a distinct culture of our own, and that we possess a world view, an outlook on life and a code of living fundamentally different from those of non-Muslims. We have all along been demanding a separate homeland for the purpose of translating into practice the ideals envisaged by Islam, and, at last, after a long and arduous struggle, in which we sustained a heavy loss of life and property and suffered deep humiliation in respect of the honour and chastity of a large number of our womenfolk, we have succeeded in attaining our cherished goal—this country of Pakistan. If, now, after all these precious sacrifices, we fail to achieve the real and ultimate objective of making Islam a practical, social, political and consti-

* Remember that this speech was delivered in 1948.—*Editor.*

tutional reality—a live force to fashion all facets of our life, our entire struggle and all our sacrifices become futile and meaningless.

Indeed, if instead of an Islamic, a secular and Godless Constitution was to be introduced, and if instead of the Islamic *Shari'ah* the British Civil and Criminal Procedure Codes had to be enforced, what was the sense in all this struggle for a separate Muslim homeland ? We could have had them without that. Similarly, if we simply intended to implement any socialistic programme, we could have done so in collaboration with the Communist and the Socialist parties of India without plunging the nation into this great booldbath and mighty ordeal.

The fact that we are already committed before God, Man and History for the promulgation of Islamic Constitution and the introduction of Islamic way of life in this country and no going back on our words is possible. Whatever the hurdles and howsoever great they may be, we have to continue our march towards our goal of a full-fledged Islamic State in Pakistan.

No doubt there do exist many hardships and difficulties in the way of achieving this goal. But what a great goal can be or has ever been achieved without bracing difficulties boldly and intelligently! And, I must emphatically say that the difficulties which impede our way are in no way insurmountable. Indeed, none of them is *real* except the difficulty that many among those who hold the reins of power are devoid of faith in the efficacy of the Islamic ideology which, in its turn, is not due to any defect in Islam

but is purely a product of their own gross ignorance of the Islamic teachings.

The first task, therefore, is to explain to our educated people the meaning and the implications of Islamic Law,—its objectives, its spirit, its structure, and its categorical and unchangeable injunctions along with the reasons for their permanence. They should also be informed of the dynamic element of Islamic Law and how it guarantees the fulfilment of the ever-increasing needs of the progressive human society in every age. Then, they should be enlightened in regard to the rational foundations of the *Shari'ah*. Finally, it is also needed to expose the hollowness of the vituperative criticisms against Islam and to remove thereby the fog of misunderstandings that shroud the issue. If once we succeed in accomplishing this task and consequently gaining the support of Muslim intelligentsia, we will pave the way for the establishment of an Islamic state and the creation of an Islmic society in Pakistan. It is with this intention that I am making this speech before the students of the Law College.

(1)
LAW AND LIFE

The term "Law" bears reference to the query: "*What should be the conduct of man in his individual and collective life?*" This query presents itself to us in connection with innumerable matters. Hence its reply covers a very wide range of topics, wider than what the term "Law" technically signifies. It includes our system of education and training in the light of

which we strive to mould the character of individuals; it comprehends our social system which regulates our social relationships; it encompasses our economic order according to which we formulate the principles of production, distribution and exchange of wealth. Thus we get a vast system of rules which determine our conduct in various walks of life. Technically speaking, all these sets of rules are not "Law".

The term "Law" is technically applied only to such of the rules as are enforceable by the coercive power of the State. But, obviously, no one who wants to understand them, can afford to confine his attention to them alone. He will have to take into consideration the entire scheme of moral and social guidance prescribed by a particular ideology, because it is only then that he will be able to appreciate the spirit and objectives of the "Law" and to form a critical opinion about its merits and demerits.

It should not be difficult to understand that the principles we recommend relating to a particular system of life are basically derived from and are deeply influenced by our conceptions about the ends of human life and by our notions of right and wrong, good and evil and justice and injustice. Consequently, the nature of a legal system depends entirely upon the source or sources from which it is derived. Thus, the differences discernible in the legal and social system of different societies are mainly due to the differences of their sources of guidance and inspiration.

This means that unless we are prepared to take into consideration the origins and the background of

the whole system of life and of the society which it brings into existence and to appreciate the complete process of the development of that system and the evolution of that society, we will not be able to understand, much less to criticise on any rational basis, the mandatory legal provisions of the system—especially when our knowledge of those provisions consists, in the main, of hearsay and conjecture.

I do feel that a comparative critical study of the Islamic and the Western system of life would be the best way to explain and elucidate my view-point. If the differences between the original sources and the basic postulates of both the systems are kept in mind, the radically different schemes of life that both envisage can be easily understood. But the paucity of time at my disposal does not permit such a digression and, consequently, I shall confine myself, at present, to the exposition of the Islamic *Shari'ah* only.

Sources of the Islamic System of Life

The first source of the Islamic system of life is a book, or, to be more exact, "The Book". The world received several editions of it under the titles of the Old Testament, the New Testament, the Psalms, etc., the last and the final edition being the one presented to mankind under the name of the *Qur'an*.

The second source of this system are the persons to whom the different editions of the Book were revealed and who, by their preachings and their conduct, interpreted them to the people. As different personalities, they bore the names of Noah, Abraham,

Moses, Jesus and Muhammad (peace be on them all), but as the bearers and upholders of the same mission of life, they all stand under the general title of "The Messenger".

The Islamic Concept of Life

The view of life which Islam has presented is that this universe of ours, which follows a set course of law and functions according to an intelligent and well-laid out plan, is in reality the Kingdom of the One God—*Allah*. It is He Who created it. It is He Who owns it. It is He Who governs it. The earth on which we live is just a small part—a province—of this huge universe and like all other parts thereof, it also functions completely under the control of God. And as regards ourselves—*i.e.*, we human beings—we are nothing more than His "born subjects." It is He Who created us, sustains us and causes us to live. Hence, every notion of our *absolute independence* is nothing but a sheer deception and misjudgement. God controls every fibre of our being and none can escape His grip.

Every thinking mind is aware of the fact that a very large sector of our life is governed and directly controlled by a Higher Power and with such absoluteness that we are practically helpless in respect of it. From the time we are conceived in the wombs of our mothers till the moment we breathe our last, we are subject to God's inexorable Laws of Nature to such an extent that we cannot claim to be free from their control even for a single moment.

Of course there is another sphere of our life in which we possess a certain amount of freedom. This

is the moral and social sphere of our life in which we are bestowed with a free-will and independence of choice in respect of individual as well as collective affairs and behaviour. But this independence can hardly justify our getting away from the Guidance of our Creator and His laws. It is only to give us a choice of either leading our lives as the obedient subjects of God—an attitude consistent with the real order of things — or of being disregardful of His commandments and thus rebel against Him and our own true nature.

Obviously, to faithfully follow the Guidance and Law of God is the truest and most consistent attitude for mankind. It sets the standard for the orderly behaviour of man both individually and collectively and in respect of the biggest as well as the smallest task he may have to face. Having once accepted the philosophy of life enunciated by "The Book" and "The Messenger" as the embodiment of Reality, one has no justification for not obeying God's revealed Guidance in the sphere of one's choice also. Indeed, it is but rational that we should admit God's sovereignty in this sphere as well just as we are perforce doing in the domain of our physical life. And this for several reasons : *Firstly*, the powers and the organs through which our free-will functions, are gifts from God and not the result of our own efforts. *Secondly*, the independence of choice itself has been delegated to us by God and not won by us through our personal endeavour. *Thirdly*, all those things in which our free-will operates are not only the property but also the creation of God. *Fourthly*, the territory in which we exercise our indepen-

dence and freedom is also the territory of God. *Fifthly*, the harmonisation of human life with the universe dictates the necessity of there being one Sovereign and a common Source of law for both the spheres of human activity—the voluntary and the involuntary, or, in other words, the moral and the physical. The separation of these two spheres into water-tight compartments lead to the creation of an irreconcilable conflict which finally lands not only the individuals but even biggest nations in endless trouble and disaster.

The Final Book of God and the Final Messenger stand today as the repositories of this truth, and they invite the whole of humanity to accept it freely and without compulsion. God Almighty has endowed man with free-will in the moral domain, and it is to this free-will that this acceptance bears reference. Consequently, it is always an act of volition and not of compulsion. Whosoever agrees that the concept of Reality stated by the Holy Prophet and the Holy Book is true, it is for him to step forward and surrender his will to the will of God. It is this submission which is called '*Islam*', and those who do so, *i.e.*, those who of their own free-will, accept God as their Sovereign and surrender to His Divine Will and undertake to regulate their lives in accordance with His commandments, are called '*Muslims*'.

All those persons who thus surrender themselves to the will of God are welded into a community and that is how the "Muslim society" comes into being. Thus, this is an ideological society—a society radically different from those which spring up from accidents of races,

colour or country. This society is the result of a deliberate choice and effort; it is the outcome of a 'contract' which takes place between human beings and their Creator. Those who enter into this contract undertake to recognise God as their Sovereign, His Guidance as supreme, and His Injunctions as absolute law. They also undertake to accept, without question or doubt, His classification of Good and Evil, Right and Wrong, the Permissible and Prohibited. In short, the Islamic society agrees to limit its volition to the extent prescribed by the All-Knowing God. In other words, *it is God and not Man whose Will is the Source of Law in a Muslim Society*.

When such a society comes into existence, the Book and the Messenger prescribe for it a code of life called the *Shari'ah*, and this Society is bound to conform to it by virtue of the contract it has entered into. It is therefore inconceivable that any Muslim Society worth the name can deliberately adopt a system of life other than the *Shari'ah*. If it does so, its contract is automatically broken and the whole society becomes "un-Islamic".

But we must clearly distinguish between the everyday sins of the individuals and a deliberate revolt against the *Shari'ah*. The former may not imply breaking up of the contract, while the latter would mean nothing less than that. The point that should be clearly understood here is that if an Islamic society consciously resolves not to accept the *Shari'ah*, and decides to enact its own constitution and laws or borrow them from any other source in disregard of the *Shari'ah*, such

a society breaks its contract with God and forfeits its right to be called 'Islamic'.

(2)
THE OBJECTIVES AND CHARACTERISTICS OF THE *SHARI'AH*

Let us now proceed to understand the scheme of life envisaged by the *Shari'ah.* To understand that scheme, it is essential that we should start with a clear conception of the objectives and the fundmentals of *Shari'ah.*

The main objective of the *Shari'ah* is to construct human life on the basis of *Ma'rufat* (virtues) and to cleanse it of the *Munkarat* (vices). The term *Ma'rufat* denotes all the virtues and good qualities that have always been accepted as "good" by the human conscience. Conversely, *Munkarat* denotes all the sins and evils that have always been condemned by human nature as "evil". In short, the *Ma'rufat* are in harmony with human nature and its requirements in general and the *Munkarat* are just the opposite. The *Shari'ah* gives a clear view of these *Ma'rufat* and *Munkarat* and states them as the norms to which the individual and social behaviour should conform.

The *Shari'ah* does not, however, limit its function to providing us with an inventory of virtues and vices; it lays down the entire scheme of life in such a manner that virtues may flourish and vices may not venom human life.

To achieve this end, the *Shari'ah*, has embraced in its scheme all the factors that encourage the growth of good and has recommended steps for the removal

of impediments that might prevent its growth and development. This process gives rise to a subsidiary series of *Ma'rufat* consisting of the causes and means initiating and nurturing the good, and further of *Ma'rufat* consisting of prohibitions of preventives to good. Similarly there is a subsidiary list of *Munkarat* which might initiate or allow growth of evil.

The *Shari'ah* shapes the Islamic society in a way conducive to the unfettered growth of good, virtue and truth in every sphere of human activity, and gives full play to the forces of good in all directions. And at the same time it removes all impediments in the path of virtue. Along with this, it attemps to eradicate evils from its social scheme by prohibiting vice, by obviating the causes of its appearance and growth, by closing the inlets through which it creeps into society and by adopting deterrent measures to check its occurrence.

Ma'rufat

The *Shari'ah* classifies *Ma'rufat* into three categories : the Mandatory (*Fardh* and *Wajib*), the Recommendatory (*Matlub*) and the Permissible *(Mubah)*.

The observance of the mandatory *(Ma'rufat)* is obligatory on a Muslim society and the *Shari'ah* has given clear and binding directions about them. The recommendatory *Ma'rufat* are those which the *Shari'ah* wants that a Muslim society should observe and practise. Some of them have been very clearly demanded of us while others have been recommended by implication and deduction from the Sayings of the Holy Prophet (peace be upon him). Besides this, special

arrangements have been made for the growth and encouragement of some of them in the scheme of life enunciated by the *Shari'ah*. Others still have simply been recommended by the *Shari'ah*, leaving it to the society or to its more virtuous elements to look to their promotion.

This leaves us with the permissible *Ma'rufat*. Strictly speaking, according to the *Shari'ah*, everything which has not been expressly prohibited by it is a permissible *Ma'ruf*. It is not at all necessary that an express permission should exist about it or that it should have been expressly left to our choice. Consequently the sphere of Permissible *Ma'rufat* is very wide, so much so that except for a few things specifically prohibited by the *Shari'ah*, everything under the sun is permissible for a Muslim. And this is exactly the sphere where we have been given freedom and where we can legislate according to our discretion, to suit the requirements of our age and conditions.

Munkarat

The *Munkarat* (or the things prohibited in Islam) have been grouped into two categories: *Haram* (*i.e.*, those things which have been prohibited absolutely) and *Makruh* (*i.e.*, those things which have been simply disliked). It has been enjoined on Muslims by clear and mandatory injunctions to refrain totally from everything that has been declared *Haram*. As for the *Makruhat* the *Shari'ah* signifies its dislike in some way or the other, *i.e.*, either expressly or by implication, giving an indication also as to the degree of such dislike. For example, there are some *Makruhat* border-

ing on *Haram*, while others bear affinity with the acts which are permissible. Of course, their number is very large ranging between the two extremes of prohibitory and permissible actions. Moreover, in some cases explicit measures have been prescribed by the *Shari'ah* for the prevention of *Makruhat*, while in others such arrangements have been left to the discretion of the society or to the individual.

The Characteristics of the Shari'ah

The *Shari'ah*, thus, prescribes directives for the regulation of our individual as well as collective life. These directives touch such varied subjects as religious rituals, personal character, morals, habits, family relationships, social and economic affairs, administration, rights and duties of citizens, judicial system, laws of war and peace and international relations. In short, it embraces all the various departments of human life. These directives reveal what is good and bad, what is beneficial and useful and what is injurious and harmful, what are the virtues which we have to cultivate and encourage and what are the evils which we have to suppress and guard against, what is the sphere of our voluntary, untrammelled, personal and social action and what are its limits, and, finally, what ways and means we can adopt in establishing such a dynamic order of society and what method we should spurn. The *Shari'ah* is a complete scheme of life and an all-embracing social order — nothing superfluous, nothing lacking.

Another remarkable fact about the *Shari'ah* is that it is an organic whole. The entire scheme of life

propounded by Islam is animated by the same spirit and hence any arbitrary division of the scheme is bound to harm the spirit as well as the structure of the *Shari'ah*. In this respect, it might be compared to the human body which is an organic whole. A leg pulled out of the body cannot be called one-eighth or one-sixth man, because after its separation from the living human body the leg can no more perform its human function. Nor can it be placed in the body of some other animal with any hope of making it human to the extent of that limb. Likewise, we cannot form a correct opinion about the utility, efficiency and beauty of the hand, the eye or the nose of a human being separately, without judging its place and function within a living body.

The same can be said in regard to the scheme of life envisaged by the *Shari'ah*. Islam signifies the entire scheme of life and not any isolated part or parts thereof. Consequently, neither can it be appropriate to view the different parts of the *Shari'ah* in isolation from one another and without regard to the whole, nor will it be of any use to take any particular part and bracket it with any other "ism". The *Shari'ah* can function smoothly and can demonstrate its efficacy only if the entire system of life is practised in accordance with it and not otherwise.

Many of the present-day misunderstandings about the *Shari'ah* owe themselves to this faulty attitude in judging its worth, namely, forming opinions about its different aspects separately. Some injunctions of it are isolated from the main body of Islamic Laws and then

they are considered in the perspective of modern civilization, or they are viewed as if they were something completely self-contained. Thus people take just one injunction of the *Shari'ah* at random, which becomes maimed after its removal from the context and then view it in the context of some modern legal system, and criticise it on the score of its incongruity with present-day conceptions. But they fail to realize that it was never meant to be isolated like that for it forms an organic part of a distinct and self-contained system of life.

There are some people who take a few provisions of the Islamic Penal Code out of their context and jeer at them. But they do not realize that those provisions are to be viewed with the background of the whole Islamic system of life covering the economic, social, political and educational spheres of activity. If all these departments are not working then those isolated provisions of our Penal Code can certainly work no miracles.

For example, we all know that Islam imposes the penalty of amputating the hand for the commitment of theft. But this injunction is meant to be promulgated in a full-fledged Islamic society wherein the wealthy pay *Zakat* to the state and the state provides for the basic necessities of the needy and the destitute; wherein every township is enjoined to play host to visitor at its own expense for a minimum period of three days; wherein all citizens are provided with equal privileges and opportunities to seek economic livelihood; wherein monopolistic tendencies are dis-

couraged wherein people are God-fearing and seek His pleasure with devotion ; wherein the virtues of generosity, helping the poor, treating the sick, providing the needy are in the air to the extent that even a small boy is made to realize that he is not a true Muslim if he allows his neighbour to sleep hungry while he has taken his meal. In other words it is not meant for the present-day society where you cannot get a single penny without having to pay interest ; where in place of *Baitul Mal* there are implacable money-lenders and banks which instead of providing relief and succour to the poor and the needy, treat them with callous disregard, heartless refusal and brutal contempt where the guiding motto is : "Everybody for himself and devil takes the hindmost" ; where there are great privileges for the privileged one while others are deprived even of their legitimate rights; where the economic system, propelled by greed and piloted by exploitation only leads to the enrichment of the few at the cost of crushing poverty and intolerable misery of the many, and where the political system serves only to prop up injustice, class privileges and distressing economic disparities. Under such conditions it is doubtful if theft should be penalised at all, not to speak of cutting off the thief's hands ! Because to do so would, as a matter of fact, amount to protecting the ill-gotten wealth of a few blood-suckers rather than awarding adequate punishment to the guilty.*

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* Here it must not be misunderstood that I am defending theft or any other form of lawlessness. Not the least ! My intention is [*Contd.*

On the other hand, Islam aims at creating a society in which none is compelled by the force of circumstances to steal. For, in the Islamic social order, apart from the voluntary help provided by individuals, the state guarantees the basic necessities of life to all. But, after providing all that, Islam enjoins a severe and exemplary punishment for those who commit theft, as their action shows that they are unfit to live in such a just, generous and healthy society and would cause greater harm to it, if left unchecked.

Similar is the case of the punishment for adultery and fornication. Islam prescribes a hundred stripes for the unmarried and stoning to death for the married partners in the crime. But, of course, it applies to a society wherein every trace of suggestiveness has been destroyed, where mixed gatherings of men and women have been prohibited, where public appearance of painted and pampered women is completely non-existent, where marriage has been made easy, where virtue, piety and chastity are current coins and where the remembrance of God and the Hereafter is kept ever fresh in men's minds and hearts. These punishments are not meant for that filthy society wherein sexual excite-

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only to show the vast and radical differences that reign between the context in which the punishment was and is applicable and the state of affairs we are today enveloped in. The only logical conclusion that follows is the need for a change in the entire system of life. When the entire structure of society is changed and a new way of life is established, the incongruity between the injunction and the present context of affairs would be obliterated and the avenues for its application would be opened.

ment is rampant, wherein nude pictures, obscene books and vulgar songs have become common recreations; wherein sexual perversions have taken hold of the cinema and all other places of amusement, wherein mixed, seminude parties are considered the acme of social progress and wherein economic conditions and social customs have made marriage extremely difficult.

(3)

LEGAL ASPECTS OF THE *SHARI'AH*

From this discussion, I think, it has become fairly clear that what we, at present, technically call 'Islamic Law' is only a part of a complete scheme of life and does not have any independent existence in isolation from that scheme. It can neither be understood nor enforced separately. To enforce it separately would, in fact, be against the intention of the Law-Giver. What is required of us is to translate into practice the entire Islamic programme of life and not merely a fragment of it. Then and then alone can the legal aspects be properly implemented.

This scheme of the *Shari'ah* is however, divided into many parts. There are aspects of it which do not need any external force for their enforcement; they are and can be enforced only by the ever-awake conscience kindled by his faith in a Muslim. There are other parts which are enforced by Islam's programme of education, training of man's character and the purification of his heart and his morals. To enforce certain other parts, Islam resorts to the use of the force of public opinion: the general will and pressure of the society. There are

still other parts which have been sanctified by the traditions and the conventions of Muslim society. A very large part of the Islamic system of law, however, needs for its enforcement, in all its details the coercive power and authority of the state. Political power is essential for protecting the Islamic system of life from deterioration and perversion, for the eradication of vice and the establishment of virtue and finally, for the enforcement of all those laws that require the sanction of the state and the judiciary for their operation.

Speaking from a purely juridical view-point it is to this last part, out of the whole Islamic scheme of life, that the term "Law" can be appropriately applied. For, it is only those injunctions and regulations which are backed by political authority that are, in modern parlance, termed as "law". But as far as the Islamic conception is concerned, the entire *Shari'ah* stands as synonymous with "law", because the entire code of life has been decreed by the All-Powerful Sovereign of the universe. However to avoid confusion, we shall apply the term "Islamic Law" to those portions of the *Shari'ah* only which demand the sanction of the State-power for their enforcement.

Major Branches of Islamic Law

The establishment of a political authority which may enforce Islamic Law requires a *Constitutional Law*, and the *Shari'ah* has clearly laid down its fundamentals. The *Shari'ah* has provided answers to the basic questions of Constitutional Law and has solved its fundamental problems viz. : What is the basic theory of the state ? What is the source of the authority of its

legislation? What are the guiding principles of state-policy? What are the qualifications of the rulers of an Islamic state? What are the objectives of an Islamic state? In whom does sovereignty reside and what are the different organs of the state? What is the mode of the distribution of power between the different organs of the state, viz.: the Legislature, the Executive and the Judiciary? What are the conditions for citizenship? What are the rights and duties of Muslim citizens? and What are the rights of non-Muslim citizens (*Zimmis*)? The guidance which the *Shari'ah* has provided in respect to these questions constitutes the constitutional law of Islam.

Besides laying down the fundamentals of Constitutional law, the *Shari'ah* has also enunciated the basic principles of *Administrative Law*. Besides that, there are *precedents* in administrative practice established by the Holy Prophet himself (peace be on him) and the first four rightly-guided Caliphs of Islam. For instance, the *Shari'ah* enumerates the sources of income permissible for an Islamic State and those which are prohibited. It also prescribes the avenues of expenditure. It lays down rules of conduct for the Police, the Judiciary and the Administrative machinery. It defines the responsibilities of the rulers regarding the moral and material well-being of the citizens, laying particular emphasis on their obligations as regards the suppression of vice and the establishment of virtue. It also specifically states as to what extent the State can interfere with the affairs of the citizens. In this connection we find not only directive principles but also many categor-

ical injunctions. The *Shari'ah* has given us the broad framework of Administrative Law—exactly in the same way as it has given the fundamentals of Constitutional Law—and has left it to the discretion of the Muslims to build up the details in accordance with the demands of the age or the country in which they live—subject, of course, to the limits prescribed by the *Shari'ah.*

Proceeding further, we find the *Shari'ah* guiding us in connection with *Public* as well as *Personal Law*—which are essential for the administration of justice. This guidance covers such an extensive field that we can never feel the need of going beyond the *Shari'ah* for meeting our legislative requirements. Its detailed injunctions are such that they can always fulfil the needs of human society in every age and in every country—provided, of course, that the entire Islamic scheme of life is in operation. They are so comprehensive that we can frame detailed laws for every emergency and every fresh problem on their basis, for which the legislature has been given the right of legislation. All the laws thus framed are to be considered an integral part of the Islamic Law. That is why the laws framed by our jurists in the early days of Islam for the sake of "Public Good" form a part and parcel of the Islamic Law.

Lastly, we have that part of the Law which deals with the relations of the Islamic State with other states, *i.e.*, the *International Law.* In this connection, too, the *Shari'ah* gives us comprehensive regulations relating to war and peace, neutrality and alliance, etc. Where, however, no specific injunctions are to be found, the

laws can be framed in the light of the general directives as laid down in that behalf.

Permanence and Change in Islamic Law

This brief classification and elucidation shows that the guidance of the *Shari'ah* extends to all the branches of Law which have been evolved by the ingenuity and need of the human mind so far. This is a standing testimony to the independence of the Islamic Law and its inherent potentialities. Anybody who takes the trouble of making a detailed study of the subject will be able to distinguish between that part of the *Shari'ah* which has a permanent and unalterable character, and is, as such, extremely beneficial for mankind, and that part which is flexible and has thus the potentialities of meeting the ever-increasing requirements of every time and age.

The unalterable elements of Islamic Law may be classified under the following heads:

(1) Those laws that have been laid down in explicit and unambiguous terms in the Qur'an or the authentic Traditions of the Prophet, like the prohibition of alcoholic drinks, interest and gambling, the punishments prescribed for adultery and theft and the rules for inheritance, etc.

(2) The directive principles laid down in the Holy Qur'an and authentic Traditions, *e.g.*, prohibition of the use of intoxicants in general, or the nullification of all exchange transactions which are not the outcome of the free-will of both the parties, or the principle that men are protectors and in charge of women.

(3) The limitations imposed on human activity by the Qur'an and the Traditions of the Prophet, which can never be transgressed, *e.g.*, the limitation in connection with the plurality of wives where the maximum number has been fixed at four, or the limitation that the number of divorces to a wife cannot exceed three, or the limitation imposed on will, the amount of which cannot exceed one-third of the total inheritance etc.

It is these unalterable mandatory provisions of the Isamic Law which give a permanent complexion to the Islamic Social Order and the characteristic features to its Culture. In fact, one cannot find a single culture in the entire history of mankind which can retain its separate entity and its distinct character without possessing an unalterable and permanent element.

If there are no permanent elements in a culture and every part of it is subject to change, amendment and modification, it is not an independent culture at all. It is just like a fluid, something which can take any and every shape and can always suffer transfiguration and metamorphosis.

Moreover, a thorough study of these directives and injunctions and limitations will lead every reasonable man to the conclusion that they have been given to us by the *Shari'ah* only for those matters where the human mind is likely to commit errors and go astray. On all such occasions, the *Shari'ah* has, so to say, set the signposts by issuing directives or making categorical prohibitions so that we may proceed along the right

path. And these signposts, far from impeding the march of human progress, are meant to keep us along the road and to save us from skidding away. In this connection, it might not be out of place here to refer to the laws of the *Shari'ah* governing marriage, divorce and inheritance which were the target of very bitter criticism in the recent past. It is these very laws, however, to which the world is now turning for guidance, though after innumerable bitter experiences!

The second part of Islamic Law is that which is subject to modification according to the needs and requirements of the changing times and it is this part of the Islamic Law which endows it with wide possibilities of growth and advancement and makes it fully capable of fulfilling all the needs of an expanding human society in every age.

This part consists of the following :—

(a) *Ta'weel (Interpretation)* : It consists in probing into the meanings of the injunctions found in the Qur'an and the *Sunnah.* As such, it has always occupied and still occupies a place of immense importance in Islamic Jurisprudence. When those endowed with penetrating insight and legal acumen ponder over the injunctions of the Qur'an and the *Sunnah*, they find that many of them are open to different fruitful and valid interpretations. Consequently, every one of them accepts some particular interpretation *according to his lights* on the merits of the case. In this way, the doors of difference of opinions have always been open in the past, are open

even today, and will continue to remain so in the future.

(b) Qiyas (Deduction by Analogy) : It consists in applying to a matter with respect to which there is no clear guidance, a rule or injunction present for some similar matter.

(c) Ijtihad (Disciplined Judgment of Jurists): It consists in legislating on matters for which neither any explicit injunctions nor even precedents exist, subject, of course, to the general principles and precepts of the *Shari'ah*.

(d) Istihsan (Juristic Preference) : It means framing rules, if necessary, in non-prohibited matters in conformity with the spirit of the Islamic legal system.

Any one who considers the possibilities inherent in the above-mentioned four ways of legislation, can never reasonably entertain any misgivings as to the dynamism, adaptability, progressive nature and power of evolutionary growth of the legal system of Islam. But it should be remembered that every Tom, Dick and Harry is not entitled to exercise the right of *Ta'weel*, *Qiyas*, *Ijtihad* or *Istihsan*. Nobody has ever recognised the right of every passerby to give verdicts on problems of national importance. Undoubtedly, it requires profound legal knowledge and a trained mind to enable one to speak with authority on any legal matter.

Similar is the case with the Islamic Law. Obviously, to achieve the status of a jurist one should be fully conversant with Arabic language and literature.

He should also have a complete grasp of the real historical background of the injunctions of Islam. He should have special insight into the Quranic style of expression. He should have a thorough knowledge of the vast literature on the Traditions of the Holy Prophet as well as of the Traditions themselves.

In the special field of analogous deduction a Muslim jurist is required to possess a keen sense of legal judgment and the requisite capacity for interpretation of facts on the basis of analogy; otherwise it would not be possible for him to save himself from falling into errors. As regards *Ijtihad*, or original legislation, it requires the jurist to have not only a deep knowledge of Islamic Law but also a developed sense of interpreting matters in the true Islamic spirit. Similarly, as regards *Istihsan* or the consideration of public good and legislation for that purpose, it calls for a complete understanding of the entire Islamic scheme of life as also a complete grasp of the spirit of Islam so that he may adopt only those things which can be appropriately assimilated in the Islamic scheme and which do not amount to driving square pegs in round holes.

And, over and above all these intellectual accomplishments, there is another thing which is vitally essential, and that is unstinted devotion and loyalty to Islam and a deep sense of accountability before God. As regards those who care little for God and of the Final Accountability, whose watchword in life is sheer expediency, and who prefer the non-Islamic

values of culture and civilization to those given by Islam, they must be regarded as the last persons to whom the work of Islamic legislation can be entrusted. For, in their hands, the Islamic Law will only suffer perversion and corruption. It will not grow, evolve and prosper.

(4)
AN EXAMINATION OF OBJECTIONS ON ISLAMIC LAW

We shall now try to examine briefly some of the objections usually raised against the demand for the introduction and enforcement of Islamic Law in Pakistan. These objections are many but it would be an unnecessary waste of time to mention all of them here. Therefore, I propose to confine myself to the examination of those objections only which are of a fundamental nature.

"Islamic Laws are Antiquated"

The first objection that is raised is that, as the Islamic laws were framed thirteen centuries ago in the light of the requirements of a primitive society, they cannot be of any use for a modern state of our age.

I doubt very much whether people who take this stand are conversant even with the rudiments of the Islamic Law and possess even an elementary knowledge of it. Perhaps, they have heard from somewhere that the fundamentals of the Islamic Law were enunciated more than thirteen hundred years ago, and they have assumed that this Law has remained static since then and has failed to respond to the requirements of

changing conditions of human life. On this misconception they have further assumed that the Islamic Law will be unsuited to the needs of the present-day society and will clog the wheels of progress. These critics fail to realize, however, that the laws propounded thirteen and a half centuries ago, did not remain in a vacuum ; they formed part and parcel of the life of Muslim society and brought into being a *State* which was run in the light of these laws. This naturally provided an opportunity of evolution to Islamic Law from the earliest days, as it had to be applied to day-to-day matters through the *Ta'weel*, *Qiyas*, *Ijitihad* and *Istihsan*.

Very soon after its inception, Islam began to hold sway over nearly half the civilized world stretching from the Pacific to the Atlantic and during the following twelve hundred years, the Islamic Law continued to be the law of the land in all Muslim States. This process of the evolution of Islamic Law, therefore, did not stop for a moment up to the beginning of the nineteenth century, because it had to meet the challenge of the ever-changing circumstances and face countless problems confronting different countries in different stages of history. Even in our Indo-Pakistan sub-continent, the Islamic Civil and Penal Codes were in vogue up to the beginning of the nineteenth century.

Thus, it is only for the last one hundred years that the Islamic Law remained inoperative and suffered stagnation. But, *firstly*, this period does not form a big gap and we can easily make up for the loss with

some amount of strenuous effort ; *secondly*, we possess full records of the development of our jurisprudence century by century and there can be absolutely no ground for frustration or despondency. Our path of legal progress is, thus, fully illumined.

Once we have grasped the fundamental principles and the basic facts concerning the evolution of the Islamic system of Law, we cannot remain in doubt that this law shall be as responsive to the urges of a progressive society in the present and the future as it has been in the past. Only those who suffer from ignorance can fall a prey to such nonsense, while those who have a grasp of Islam and the Islamic Law, and aware of its potentialities of progress and those who possess even a cursory knowledge of the history of its development, can never suspect it of being an antiquated or stagnant system of law, incapable of keeping pace with the march of history.

"Islamic Laws are Relics of Barbarism !"

The second most common objection—an objection which is put forward publicly only in a roundabout manner but which is presented with much vehemence and venom in private talks—is that Islam is just a relic of the dark ages ! And those who say so also argue, with an air of haughtiness and arrogance, that the "progressive, cultured and humane" outlook of the modern, enlightened age can never tolerate such "cruel" penalties as the cutting of the hands, or flogging, or stoning to death—penalties imposed by Islam for certain crimes.

This objection and this allegation, coming as it does from the supporters of modern Western civilization, makes one gasp with wonder. It is, indeed, amazing to hear that the normal values of the present age are "advanced" and "progressive." The heartlessness shown by the "enlightened" man of today to his fellow-beings hardly finds a parallel in the darkest ages of history. He does not punish by stoning to death, but he can kill people indiscriminately with the atom bomb. He does not merely cut off the hands of the people but he also tears their bodies into shreds. He is not content with flogging, he would like to burn alive the people *en masse* and manufacture soap out of the fat extracted from their dead bodies.* Leaving aside these demonstrations of heartlessness during the period of war wherein everything is considered fair nowadays, the modern man brutally chastises—and does it unsparingly—the political "criminals": the *alleged* "traitors" to the national cause and the rivals in the economic and political fields. The highly objectionable and inhuman modern methods of investigation and extortion of confession employed *even before proving the charges*, are an open secret. In view of these facts, it is nonsensical to say that the modern man cannot tolerate the punishments prescribed by Islam for *proved* and *established* criminals because he possesses a more refined outlook; and it does not lie in the mouth of those who can tolerate bloody "purges" after concocted confessions and phony trials and who uphold politi-

* This was done in Germany, one of the most "progressive" countires in the world—*Editor.*

cal inquisitions and concentration camps, to pour out venom against the Islamic Penal Code.*

The truth is that it is not the severity of the punishments in Islam which the upholders of modern civilization abhor, for they resort to even more tortuous punishments themselves. The reason for their hysteric outbursts against this alleged "barbarism" lies actually in the perversion of moral values—that is, in the fact that they do not think that crimes like drunkenness and adultery deserve even a word of reproach, what to speak of painful punishments. Had they been opposed to these punishments on humanitarian considerations, they would have likewise condemned the brutal punishments given to people on flimsy political and economic grounds. They complain in respect of Islam only because they do not at all deem as a sin or crime many a thing condemned by it.

I would like to put a straight question to these votaries of "modernity": "What are the values that you believe in? Do you believe in the Islamic values of life and standards of morality or those of the modern civilization? If you have made your choice and accepted some other values and some different standard of

* "Prof. E. F. M. Durbin, after narrating the callous and inhuman treatment which is being meted out in the most "progressive" states of the world, concludes that: "such large-scale brutality has rarely been witnessed, I am thankful to say, in the previous history of the world" (*The Politics of Democratic Socialism*, 1948, p. 25).

See also Khurshid Ahmad, *Fanaticism, Intolerance and Islam*, Islamic Publications Limited, Lahore, 3rd ed., 1967—*Editor*.

right and worng, of virtue and vice, of the permissible and the prohibited as against those envisaged by Islam, it is then a difference of a very fundamental nature. It means that you differ with and disbelieve in the Islamic ideology itself. In this case you should have the courage to declare that you reject Islam outright. Is it not foolish to allege faith in a God whose laws you consider as barbarous ? Anyhow nobody can remain inside the pale of Islam after holding such an opinion about the law of God.*

The Bogey of Sectarian Differences

We have dealt with two objections so far. The third objection is that there being many schools of Islamic Jurisprudence, it is not possible to evolve an agreed code of law which might be acceptable to all the schools of Muslim thought. It is this objection on which rests the last hope of the opponents of the Islamic

* Here the learned author is replying to those critics who claim to be Muslims but under the spell of alien influences want to amend the basic tenets of Islam, without any regard for the spirit and the ideals of Islamic ideology. They are apologetic in their attitude and want to blow hot and cold in the same breath.

As to the question whether the punishments are too harsh or not, he has already answered in the earlier part of the discussion. Islam creates such conditions as may ensure the elimination of the *causes* of the commission of crimes. But, if, in spite of it, the evildoers commit them, Islam punishes the criminals in such a way that others may not dare to do that. That is why we find that when these punishments were in vogue, crimes were extinct, while today, despite all the clap-trap, the crimes are on the increase and we hear voices from social quarters that the standards of punishments are proving incapable of grappling with the problem.—*Editor.*

Law, and they seem to feel confident that on this count they will be able to score a point by driving a wedge among the Muslims. Moreover, this problem also baffles many sincere people who are loyal to Islam and who, not being fully conversant with its teachings, fail to understand how this 'complication' can be removed. The fact is that this complication is merely a figment of fertile imagination, for, the existence of different schools of law can never become an obstacle in the way of the enforcement of Islamic Law.

The first point to be understood in this connection is that the broad outlines of Islamic Law, consisting of mandatory and unalterable commandments and fundamental principles and limitations have always been accepted unanimously by all the Muslim schools of thought. Neither there ever was, nor there is now, any conflict of opinion regarding this portion of our Laws. Whatever differences had ever arisen were always in connection with the details that were to be framed through interpretation, deduction and *Ijtihad*—all, of course, within the limits prescribed by Islam.

The nature of these differences can also be understood by the fact that rules derived by jurists through interpretation, deduction, *Ijtihad* or *Istihsan* could never acquire the force of law without either being accepted unanimously (*Ijma'*) or having the approval of the majority (*Jamhoor*). This explains why the phrases like عليه الاجماع (unanimous agreement), عليه الجمهور (majority agreement) and عليه الفتوى (adopted judgment) are appended to the expression of final opinions by our jurists in discussing legal matters, and it signi-

fies that their opinion had finally to obtain legal sanction in order to become a law for Muslims.

These unanimous or majority decisions can be of two kinds. *Firstly*, those which have always been accepted by the entire Muslim world or by the majority of Muslims. *Secondly*, those based on the unanimous agreement of the Muslims of a particular country at a particular period, or of their majority.

Decisions coming under the first category, if based on unanimous-agreement, are not subject to review and should always be accepted as part and parcel of Muslim Law.

Decisions made by majority agreement can be accepted as law only if the majority of the Muslims of the country wherein they have to be promulgated also accepts them as such. If the majority of that country accepts them they will become a law for this country, otherwise not.

So much about the past. As for the future, the laws which are accepted unanimously by majority of the Muslims of this country, will be enacted here. In the past too, this has been the practice and no law used to operate without either the unanimous approval or the approval of the majority of the Muslims. And it is this method which is practicable even today. I do not think that any other procedure can be prescribed from the democratic point of view either.

A question may be asked as to what would be the position of those Muslims who might not agree with

the majority.* They are entitled to demand the enforcement of their own Code in their personal matters and this demand of theirs must be accepted. But, of course, the "Law of the Land" shall be the one which has the sanction of the majority.

I am sure that no Muslim of any sect would ever adopt the foolish position of preferring the continuance of un-Islamic laws in Pakistan on the ground that he is not in agreement with the views of the majority of Muslims on certain points of Islamic Law. Obviously we cannot discard the Islamic way of life simply because we are not unanimous on all details of its law. Has there ever been or can there ever be any law or system of life on all details of which all its followers were, are or can ever be unanimous ? What do you say about the legal system, that is in force in the country at present or anywhere else ?

The Problem of Non-Muslim Minorities

The last important objection in this respect is that there is a substantial non-Muslim minority living in Pakistan who cannot tolerate being governed by the religious laws of the Muslims.

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*This objection was blown up by the complete agreement of the '*Ulama*' of all schools of thought in the Conventions held in 1951 and 1953 at Karachi. In those Conventions, the '*Ulama*' unanimously formulated the Basic Principles of the Islamic State (see Appendix I) and also moved Amendments to the Basic Principles Committee's Report (see Appendix II). This objection, therefore, has absolutely no ground—*Editor.*

This objection is based on a very superficial observation and shows a lack of proper analysis of the problem. For even a little amount of cool thinking can dissipate the fog of this misunderstanding.

The law with which we have been and are concerned here is the *law of the land* and not the personal law of any community. In personal matters, every community is welcome to adopt its own personal law. Indeed, it is only Islam which guarantees this right in the most liberal manner to all the minorities living in an Islamic State. It is Islam which has taught to the modern world the real difference between the 'law of the land' and the 'personal law' and which enunciated the principle that in a multinational state the personal affairs of a man should be settled according to his own Personal Law. Therefore, no minority group should feel afraid that we would thrust our own religious laws on them in their personal matters, and shall, thus, violate an injunction unambiguously laid down by Islam itself.

The question that now remains to be dealt with is: What should be our 'law of the land'? I think it is the demand of justice and fairness that the Law which commands the approval of the majority alone has the right to become the Law of the Land.

Minorities are entitled to demand safeguards for their legitimate rights and interests and we are bound to concede this demand as Islam itself enjoins us to do so. But it is not fair for the minorities to ask us to throw our ideology overboard and introduce laws which

are against our convictions merely for the sake of appeasing them. When we were helpless because of foreign domination, we tolerated the supremacy of un-Islamic Laws. But now when we are masters of our destiny, we cannot replace Islamic Laws by those of any other type without conscious apostacy and betrayal of Islam. Are the minorities really entitled to ask the majority to give up its religion and its way of life ? Have they the right to demand that the majority should give up the principles which it considers right and adopt others which are against its convictions ? Or, is it reasonable that in a multi-religious country all the communities should become irreligious ? If the answers to all these questions are in the negative, I find no reason why 'Islamic Law' should not become the 'Law of the Land' in a country where Muslims are in a predominant majority.*

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*Moreover, the true position is that the representatives of the Christians in the First Constituent Assembly of Pakistan and some of the leaders of the scheduled castes, who form the most important minority, have *demanded* the establishment of an Islamic State, for they hold that their rights can be better safeguarded in such a state. They know that an Islamic State does not permit any chasm to exist between precept and practice. All Muslims are under an obligation to do what their religion commands. And if they violate, they can do so only at the cost of their own religion—nay, their very faith and salvation.—*Editor.*

CHAPTER II

HOW TO INTRODUCE ISLAMIC LAW IN PAKISTAN

In my previous discourse* I had dealt with the spirit and the fundamental precepts of Islamic Law and our duties and obligations in this regard. I had also replied to the objections that are generally put forward about the introduction of Islamic Law in modern times and to the criticisms about its efficacy as a legal system. That address of mine was of an introductory nature. Now I propose to discuss this problem at greater length and will explain the course that should, in my view, be adopted for the enforcement of Islamic Law in our country.

I would like, at the very outset, to dispel some of the doubts and misgivings which crowd into the minds of a considerable section of our people as soon as they think of the enforcement of Islamic Law. Many people on hearing of our intention to establish an Islamic State in Pakistan, which would, of course, be governed by Islamic Law, begin to think that the very moment Pakistan is declared an Islamic State, all the present laws will be repealed and replaced by corresponding Islamic laws without a minute's delay and all in one stroke.

This misunderstanding is not confined to the common folk only. It is found among persons of religious understanding as well. They seem to think

* The reference is to Chapter I, 'The Islamic Law.'—*Editor.*

the day we resolve to mould Pakistan into an Islamic State, it should also be the day of the practical fulfilment of that resolution. Such people overlook the fact that the legal code of a country does not exist in a vacuum. Rather, it is deeply interlinked with the ethical norms and the social, economic and political order of the country. They do not realise that so long as the social set-up of a country does not alter radically, the legal system can undergo but little change. They also forget that vital changes have been wrought in our lives during the period of the British rule and that the entire mode of our living has been de-Islamised. It has been divested of its Islamic character and is being governed by principles derived from sources other than Islam. Consequently, what is required of us is to Islamise the entire system of our life. And this, in its turn, is an uphill task and demands an enormous amount of strenuous effort.

Having no idea of the practical problems of modern life, these fervent but ignorant lovers of Islam take the task of revolutionising the collective life of a nation very lightly and superficially. Hence they indulge in day-dreaming and crying for the moon. But such an outlook serves only the interests of those who are trying their best to prevent the establishment of an Islamic State and provides them with grounds to scoff at the very idea of this venture.

(1)
GRADUAL CHANGE

If we really wish to see our Islamic ideals trans-

lated into reality, we should not overlook the basic law of nature that all stable and far-reaching changes in the collective life of a people come about gradually. The more sudden a change, the more short-lived it generally turns out to be. For a permanent change it is necessary that it should be free from extremist bias and unbalanced approach.

The best example of this gradual change is the revolution brought about by the Holy Prophet (peace be on him) in Arabia. One who is acquainted, even superficially, with the history of the Prophet's achievements, knows, that he did not enforce the entire body of Islamic Law all at once. Instead of that, the society was prepared gradually for their enforcement. He started his efforts for reform by inculcating belief in the fundamentals of Islam, *viz.*, the unity of God, the Life after Death and the institution of Prophethood and by inducing the people to live a life of righteousness and piety. Those who accepted this message were trained by him to believe in and practise the Islamic way of life. When this was achieved to a considerable degree, the Prophet (peace be on him) went a step further and established an Islamic state in Madinah with the object of making the entire life of the country conform to the Islamic pattern. After gaining political power and taking the reins of administration in his hands, he (peace be on him) started an all-out campaign for the regeneration and the reconstruction of the collective life of the community on Islamic concepts of life : an end for which he had been

heretofore endeavouring by means of preaching and persuasion only. He (peace be on him) introduced a new system of education—a system which, in keeping with the conditions obtaining in his time, consisted mainly of verbal instruction and went on with the execution of a well-chalked-out and a systematic plan for an overall reform in the moral, social, cultural and economic life of the corrupt society of his day. These efforts progressively brought about a radical change in the mental outlook and the practical conduct of the people. In commensuration with the progress made in this field the Prophet (peace be on him) uprooted the practices of the "Age of Ignorance" one by one and substituted for them new, moderate and humane principles of human conduct. Along with these reforms, the Prophet proceeded with the gradual enforcement of the legal code of Islam, and the result was that within a period of nine years the life of the country was Islamised in all its aspects—social, political, economic and legal.

A careful study of the Qur'an and the *Hadith* reveals the gradual and marvellously effective course adopted by the Prophet. We find that the Islamic law of inheritance was enforced in the third year after the migration *(hijrah)*. The gradual enforcement of the rules and regulations regarding marriage and divorce was completed in the year 7 A.H. The enforcement of criminal code was spread over a period of many years and got its final touches in the year 8 A.H. An atmosphere congenial for the prohibition of wine was created gradually and its absolute prohibition was effected

in the 8th A.H. Similarly, though the evils of interest were stressed early in Meccan life (*i.e.*, before the Holy Prophet migrated to Madinah) yet it was not practically prohibited until 9 A.H. when the whole economic structure of the Muslim society had undergone a complete transformation and the new social order had been firmly established.

All this can be very well compared to the labour of an architect who, while erecting a building, proceeds gradually with his plan. He begins with gathering an adequate number of masons and other labourers and procuring the required material; he then levels the ground, lays the foundation and raises the walls brick by brick. The roof is laid when the walls are ready and thus after continuous and extensive hard labour, he completes the construction of the building.

The British rule over this sub-continent is another such instance from our recent past. As we all know very well, the Britishers did not commit the mistake of changing the entire set-up of Indian life including its legal structure all at once. The Islamic *Shari'ah* was the law of the land before their arrival, and it was no easy job to wipe out the current traditions of living and to bring about a thorough Westernization of the entire life. Consequently, for a considerable period of time after the establishment of the British rule, the Islamic *Shari'ah* remained in vogue in the country. The courts had the *Qadis* to decide the cases in accordance with the Islamic *Shari'ah* which was not confined only to the personal affairs of the Muslims but constituted the law of the land. The

Britishers tolerated all that and took about a hundred years to replace the *Shari'ah* by their own code of law.

All this was done very gradually and systematically. First of all the Britishers trained the people who could serve their purpose by effecting a change in the educational system of the country. Skilfully they propagated their ideas, reinforced their propaganda with official power and thus revolutionised the mental attitudes of the people. They also changed the economic order prevailing in the sub-continent. All this resulted in a gradual change in the collective life of the country followed by a gradual replacement of old laws by new ones.

Coming to our own times and our own country, Pakistan, if we wish to promulgate Islamic Law here it would mean nothing short of demolishing the entire structure erected by our British masters and the erection of a new one in its place. It is obvious that this cannot be achieved by just an official proclamation or a parliamentary bill, because it is a stupendous task and demands a good deal of hard and systematic work according to a well-thought-out and all-embracing programme. For instance, we need a thorough reorientation of our educational system. At present we find two kinds of educational institutions running simultaneously in our country, namely, the old religious '*madrasahs*' and the modern secular schools, colleges and universities. None of them can produce people needed to run a modern Islamic state. The old-fashioned schools are steeped in conservatism to such an extent that they have lost all touch with the modern

world. Their education has lost all contact with the practical problems of life and has thus become barren and lifeless. It cannot, therefore, produce people who might be able to serve, for instance, as judges and magistrates of a progressive modern state. As for our modern secular institution, they produce people who are bereft of even a rudimentary knowledge of Islam and its laws. Moreover, we can hardly find such persons among them whose mentality has not been affected by the poisonous content and the thoroughly materialistic bias of modern secular education.

There is yet another difficulty. The Islamic Law has not been in force for the last one century or so. Consequently, our Legal Code has become stagnant and lags behind the time, while our urgent need is to bring it in level with the latest developments of the modern age. Obviously, this would require a considerable amount of hard work.

There is, however, an even bigger hurdle. Living under the domination of an alien power and deprived of the Islamic influences for a long time, the pattern of our moral, cultural, social, economic and political life has undergone a radical change and is at present far removed from the Islamic ideals. Under such circumstances it cannot be fruitful, even if it were possible, to change the legal structure of the country all at once because then the general pattern of life and the legal structure will be poles apart, and the legal change will have to suffer the fate of a sapling planted in an uncongenial soil, facing a hostile environment. It is, therefore, inevitable that the required reform should be

gradual and the changes in the laws should be effected in such a manner as to balance favourably the change in the moral, educational, social, cultural and political life of the nation.

But making a pretext of this reasonable consideration for gradation in change, some people plead for the establishment of a secular state for the time being. They argue that when an Islamic atmosphere is created, an Islamic state will automatically come into existence and the enforcement of Islamic law will follow in its natural course. Such statements are absolutely fallacious and misleading. The question is : Who will build up the required Islamic atmosphere? Can an irreligious state, with Westernized people at its helm, do this job? Will the persons well-versed only in running bars and night-clubs and movie-houses spend their energies in constructing and maintaining mosques ? If the answer is in the affirmative, it will indeed be a unique experiment of its kind in human history : ungodliness fostering godliness so that it might ultimately be supplanted by the latter !

If they have any other interpretation, they may kindly elucidate as to who will create the "Islamic atmosphere" and what will be the resources at his command ? And, during this interim period, what will be the purpose of the secular state ? What end will its organs serve ?

If we reflect for a moment and consider the examples quoted above to support the principle of gradual change in the transformation of collective life, we can very well understand that a system of life, whether

Islamic or un-Islamic, can be brought into existence only when the goal is unmistakably clear and a definite plan is chalked out for the achievement of that goal.

The Islamic revolution brought about by the Holy Prophet (peace be on him) was the outcome of years of toil——years spent in producing men suitable for the cause and in changing the outlook of the people by propagating the teachings of Islam. And above all, the entire administrative machinery of the small city state of Madinah was utilized for the regeneration of the society and the creation of a new civilization. Thus was the ground prepared for the enforcement of the Islamic laws.

The Britishers too could succeed in bringing about their cherished changes in India only because the reins of government were in their hands and because they knew the proper method of transforming the collective life of a people. They had a definite goal and a clear plan. They worked incessantly for it and at last succeeded in establishing a legal system which was in conformity with their ideology and culture. But still some people are under the delusion that a building can be erected without architects or by those who are neither competent nor willing to do the job !

(2)

THE CORRECT PROCEDURE

No reasonable person can deny that Pakistan was demanded and established in the name of Islam and for the sake of the revival of its glory. It is thus

potentially an Islamic ideological state. And this being so, it must be recognized as an incontrovertible fact that it is the state which should play a positive role in the establishment of the Islamic system of life. When the state is our own and we have placed at its disposal all the resources of our country, there is no reason why we should go elsewhere to fetch the architects of the Islamic social order.

First Step——If what has been stated above is correct, then the first step towards our destination would be to Muslimise (convert to Islam) the state which is still based on and working according to the same secular bases on which it did during the British period. The practical shape for the achievement of this end would be that our Constituent Assembly should unequivocally declare :

(i) That the sovereignty in Pakistan belongs to God Almighty alone and that the Government of Pakistan shall administer the country as His agent ;

(ii) That the basic law of the land is the Islamic *Shari'ah* which has come to us through our Prophet Muhammad (peace be on him).

(iii) That all those existing laws which may be in conflict with the *Shari'ah* shall in due course be repealed or brought into conformity with the basic law and no law which may be in any way repugnant to the *Shari'ah* shall be enacted in future.

(iv) That the State, in exercising its powers,

shall not be competent to transgress the limits laid down by Islam.

This declaration will have a far-reaching effect on every department of our national life. For instance, after such a declaration, our voters will become aware of the purpose for which they have to elect their representatives. Howsoever deficient the general mass of our voters may be in respect of formal education, they certainly possess the sense to decide as to what type of people can be relied upon for a certain purpose. We have never seen them committing the folly of seeking the services of a medical practitioner to plead a legal case for them or to approach a lawyer for medical treatment ! They do know, if not fully at least to a considerable extent, as to who, among their fellow countrymen, are God-fearing and virtuous and who are completely given to worldliness, self-interest and vice. People choose persons according to the ends in view. Up till now they never had in view the object of electing representatives for running an Islamic system of government. Therefore, they had no need of finding out the people suitable for this purpose. The country had a system of government devoid of religious ideals and moral values and it required a particular type of people to administer it. People, therefore, had the same type of men in view and voted them to power. Now, if we frame an Islamic constitution and the people are confronted with the question of electing those who are capable of efficiently running the Islamic system of government, they will naturally keep Islamic standards

before themselves. Their selection may not be an ideal one, but this much is certain that they will not select the wicked or the corrupt type or the blind imitators of the West. They are bound to select those persons who are both mentally equipped for the task.

Second Step—Our next step towards the establishment of the Islamic way of life should be the transference of the reins of power to the people who are capable of using it effectively for the realization of the above-mentioned objective. This will of course be achieved through the well-known democratic procedure of general elections.

Third Step—The third step will be to chalk out a comprehensive plan for a thorough reform of all the departments of our national life for which all the resources of the state will have to be utilized. Thus, the educational system will be reorientated ; all the means of propaganda—the press, the platform, the cinema and the radio—will be used for the purpose of creating a new Islamic consciousness, a new healthy outlook ; and an incessant and systematic effort will have to be made to mould the society and its culture into Islamic patterns.

Persons who have been incorrigibly affected by the decadent, sinful and corrupt system of life can be compared to a fibre of discordant colour which will not fit into our pattern. They are the lost men and are of no use from our point of view. Such people will have to be replaced everywhere by those who can prove helpful in the task ahead.

The economic system will also have to be basically altered and its whole structure which is built on the Hinduistic and Western semi-feudalistic and semi-capitalistic foundations, will have to be demolished.

I am sure that if a righteous group of people, possessing vision and statesmanship, wields political power and, making full use of the administrative machinery of the Government, utilizes all the resources at its disposal for the execution of a well-conceived plan of national regeneration, the collective life of this country can be totally changed within a period of ten years. And as this change comes about gradully, the British-made laws can be amended or repealed and replaced by the Islamic laws. This process will continue as such for some time and ultimately all un-Islamic laws will be repealed and our state will be governed by Islamic laws alone.

(3)

CONSTRUCTIVE WORK FOR THE ENFORCEMENT OF ISLAMIC LAW

At this stage it seems necessary to throw some light on the constructive work that has to be done in order to change the existing legal system of the country and to replace it by an Islamic one. The vast programme of reform to which I have referred above, demands an enormous amount of hard work in almost every walk of life. After centuries of stagnation and inertia, degeneration and mental

parasitism and servitude, we find that every aspect of our national and cultural life has been reduced to a mess. Here I will confine myself only to the ways and means necessary for effecting reform in the legal system and will not deal with the measures that should be adopted for the reform of other aspects of our national life.

(A) The Academy of Law:

The first thing that should be done towards this direction is the establishment of an Academy of Law which should take stock of the entire legal literature bequeathed by our ancestors. This academy should not only translate into our national language all those books which are necessary for acquiring an understanding of Islamic Jurisprudence and Law but also edit and annotate them afresh according to modern methods of editing so that they may become accessible to the modern educated people and useful for our present-day needs. As we all know, a very great part of the literature on Islamic Jurisprudence is still in Arabic and the modern educated of our people are generally not conversant with this language. The result is that owing to inability of their approach to the real sources and the inimical propaganda of our opponents, they have come to harbour many a misunderstanding about Islamic Law. These misunderstandings have in some cases assumed such proportions that some people have started even saying in so many words that the entire mass of age-old controversies, legal hair-

splittings and long-drawn arguments should be thrown into the waste-paper basket and that we should start work on Islamic Law all afresh. But the fact of the matter is that the people who express such funny ideas betray not only their lack of knowledge but also their lack of vision and imagination. If such people earnestly and dispassionately study the achievements of their ancestors in the field of jurisprudence, they will shudder at their ignorance. They will come to know that during the last thirteen centuries, their forefathers had not been engaged in fruitless controversies: on the contrary, they have left a very vast and priceless treasure of knowledge and research for the posterity. They have built for us quite a considerable portion of the edifice; and what a folly it would be if, out of sheer ignorance, we insist on demolishing what has already been built and start constructing all anew. Even common-sense demands that we should make the best use of what we have inherited from our forefathers and spend our energies only on further expansion according to our present needs. Otherwise, if every generation of ours were to reduce the labours of its predecessors to naught and start anew, we would never be able to make any progress worth the name.

I have already mentioned in my previous discourse* that during the past centuries the various Muslim states which flourished over a large part of the then civilized world, had Islamic *Fiqh* as their

* See Chapter I, 'The Islamic Law'.—*Editor.*

'law of the land.' Muslims of those days were not "barbarians". Rather, they had a highly advanced culture and their scholars of religious law had applied Islamic principles to all the problems of their civilization. It were these experts of Islamic *Fiqh* who held important positions as magistrates, judges and chief justices and their judgments, and decrees have produced a large volume of legal precedents. Indeed, these experts have made prodigious contribution to every branch of law. Their works evoke one's highest admiration not only when they discuss problems of Civil and Criminal Law but also when they deal with the problems of Constitutional and International Law. A perusal of their writings and judgments gives us an idea of their deep insight in, and their intelligent and masterly grasp of, all these problems. What is really needed now is that a body of scholars should be deputed to take a detailed stock of all the writings left by our ancestors and to re-edit them in the form of modern books of Law.

There are some books which must necessarily be translated into the national language :

1. The following three books on *Ahkamal-Qur'an* (the Legal Injunctions of the Qur'an) :—

(i) *Al-Jassas* ;
(ii) *Ibn al-'Arabi* and
(iii) *Qurtubi.*

Their sutdy will train our students to deduce injunctions and laws from the Qur'an. These books present a commentary on and an explanation of all the

Quranic verses relating to legal commandments and also contain all the relevant details from *ahadith* (Prophet's Traditions) and the sayings and practices of the Companions of the Holy Prophet (peace be on him). Besides these they give us the various deductions made by the great jurists of the past along with their arguments in favour of those deductions.

2. Next to these three books on Quranic injunctions comes the great treasure of the commentaries on the books of *Hadith*. In these books, apart from commandments and laws, we find the best material on legal precedents and their explanations. From this treasure the following books should particularly be translated :

(i) On *al-Bukhari : 'Aini* and *Fat'h al-Bari*.

(ii) On *Muslim : Nawewi* and *Fat'h al-Mulhim*.

(iii) On *Abu Da'ud : 'Aunul-Ma'bud* and *Badhl al-Majhud*.

(iv) On *Muwatta* : Shah Wali-ullah's *Musawwa* and *Musaffa*, and *Aujaz al-Masalik* by a contemporary Indian scholar.

(v) On *Muntaqa al-Akhbar* : Shaukani's *Nail al-A'wtar*.

(vi) On *Mishkat : Att'aliq-us-Sabeeh*.

(vii) On *'Ilm-al-A'thar : Ma'ani al-A'thar* by Imam Tahawi.

3. After this we should turn to the fundamental books of *Fiqh* from which the following must particularly be translated :

(i) On Hanafi *Fiqh* :

Al-Mabsut and *Sharh al-Siyar al-Kabir*

by Imam Sarakhsi;
Bada'i' al-Sana'i' by Kashani ;
Ibn Humam's *Fat'h al-Qadir ;*
Hidayah and
Fatawa-i-Alamgiri ;

(ii) On Shafe'i *Fiqh* :
Kitab al-Umm ;
Sharh al-Muhadhdhab and
Mughni al-Muhtaj ;

(iii) On Maliki *Fiqh :*
Al-Mudawwanah and any other important book that might be selected by scholars ;

(iv) On Hanbali *Fiqh* :
Al-Mughni by Ibn Qudamah ;

(v) On Zahiri *Fiqh* ;
Al-Muhalla by Ibn Hazm ;

(vi) On *Madhahib-e-Arba'ah* (the Four Schools of Thought) :
Bidayat al-Mujtahid by Ibn Rushd and *Al-Fiqh-fil-Madhahib al-Arba'ah* compiled by Egyptian scholars ;

(vii) On certain special problems :
Kitab al-Kharaj by Imam Abu Yusuf ; *Al-Kharaj* by Yahya Ibn Adam ; *Kitab al-Amwal* by Abu 'Ubaid al-Qasim ; *Ahkam al-Wakf* by Hilal Ibn Yahya and *Ahkam al-Muwarith* by Dimyati.

4. We must also translate some important books on Jurisprudence and on the philosophy of law, so that our legal experts may acquire a deep insight

into and gain a correct understanding of the spirit of Islamic *Fiqh*. In my opinion the following books should be selected for this purpose :

(i) *Usul al-Ahkam* by Ibn Hazm.

(ii) *Al-Ihkam li-Usul al-Ahkam* by Amidi.

(iii) *Usul al-Fiqh* by Khadari.

(iv) *Al-Muwafaqat* by Imam Shatibi.

(v) *I'lam al-Muwaqqi'in* by Ibn al-Qayyim.

(vi) *Hujjat Allah al-Balighah* by Shah Wali-ullah.

As I have already said, our need is not only to translate these books but also to re-arrange their contents on the pattern of modern books of Law. New headings will have to be set, scattered discussions on legal problems will have to be gathered and collected under relevant headings, and indices will have to be prepared. Unless we take pains to effect these improvements these books will not become fully useful for our present-day needs. The method of compiling a book in olden days was quite different from that of the present age. Moreover, in those days such detailed classifications of Law as exist today had not yet come into existence. For instance our jurists had no separate branch of Constitutional Law or International Law. No doubt, they dealt with these problems but under headings like *Jihad* (Laws of War and Peace), *Kharaj* (Revenue and Finance), Marriage and Inheritance. Likewise, they had no separate branch of Criminal Law. They dealt with such problems

under the headings of *Hudud* (Punishments), *J*' (Crimes) and *Diyat* (fine-money or blood-money). They were used to discuss a subject at different places, therefore material on a certain subject is often scattered under so many headings. They also did not discuss Economics and Finance as separate subjects. They severally dealt with these subjects under headings like : 'the book of sales', 'the book of land-cultivation' etc. In the same way, they did not use modern terms like Law of Evidence, Civil Procedure Code, Penal Code, Criminal Procedure Code etc. Questions relating to these aspects of law were discussed by them under headings like 'the etiquette for the judges,' 'the book of claims,' 'the book of agreements' and so on. Now if these books are merely translated they cannot be of much use to us. It is, therefore, imperative, that persons having knowledge of modern legal systems should work on all such materials and rearrange them to fulfil the modern requirements. If this is considered to be a very laborious and lengthy task, we should at least prepare complete and exhaustive indices of all these works and should also compile detailed bibliographies for the guidance of a student of law. These should cover all the branches of modern Law so that one may not experience any difficulty in finding out material on a required topic.

(B) The Codification of Law

The next important step in this connection is to appoint a body of Islamic scholars and experts of modern legal thought who should be entrusted with the task

of codification of the Islamic Law section and clause-wise according to the modern patterns. In my discourse on the Islamic Law,* I have already explained at length that, from academic and Islamic points of view, it is not binding to accept any and every saying or expression of opinion by an authority on *Fiqh*, or anything and everything written in a book of *Fiqh*. This is so because everything contained in a book of *Fiqh* does not constitute Islamic Law. It is only the following four things that constitute Islamic Law :—

(i) An explicit commandment of God laid down in the Qur'an ; or

(ii) An explanation or elucidation of a Quranic commandment or an explicit order or prohibition from the Holy Prophet (peace be upon him) ; or

(iii) An interpretation, inference, *qiyas* (analogy), *ijtihad*, or *istehsan* (juristic preference) on which there has been a consensus *(ijma')* of the *ummah* ; or it may be a majority decision of the *'ulama'* which has been accepted by an overwhelming majority of our own people ; or

(iv) An *ijma'* or a majority decision of the nature discussed in (*iii*) above arrived at by our own men of learning and authority.

My proposal is that a body of experts of Islamic laws should compile the first three categories of laws

* See Chapter I, 'The Islamic Law'—*Editor*.

and commandments into a Code. Additions to it will continue to be made as fresh laws are framed by general consent or majority decision. If and when such an exhaustive code has been compiled, it will be the basic book of Law and all the current books of *Fiqh* will serve as commentaries for this book. Thus the enforcement of Islamic Law by our courts and its teaching in our Law Colleges will be greatly facilitated

(C) Reform of Legal Education

The third important measure will be to change the prevailing system of legal education. It is imperative that both the courses of study and the methods of teaching should be radically changed and overhauled so that our law colleges may prepare the students academically as well as morally for the enforcement of Islamic Law in the country.

The type of education which is being imparted in our law colleges at present is worthless from our point of view. Students who receive this education not only fail to develop any insight in the Islamic Law, but their mentality and mode of thought also become anything but Islamic. Moreover, the atmosphere of these colleges is such that the students are deprived of the opportunity of imbibing those moral qualities which are needed to run an Islamic state. Consequently, unless we change this state of affairs and radically reorient the curricula and the methods of teaching to suit our need of producing legal experts of a high mental and moral calibre who are well-versed in Islamic as well as modern legal thought, we cannot have good lawyers,

magistrates and judges for the courts of an Islamic state.

For this purpose I would like to make certain suggestions for the consideration of the scholars and the educationists :

(1) The first and basic reform is to decide that the knowledge of Arabic shall be a pre-requisite for admission to a law college. This knowledge of Arabic should be such as to enable the student to study the Qur'an, the *Hadith* and the *Fiqh*. Though we do desire to make our own language the medium of instruction in Law as much as in other subjects and want all the relevant books to be translated,nevertheless the necessity of a fair knowledge of the Arabic language is immense. An insight into Islamic Law cannot be gained unless one knows the language of the Qur'an, and that of the Prophet (peace be on him). In the initial stages we shall no doubt experience difficulties in obtaining Arabic knowing students for law colleges. We might even have to start Arabic classes in law colleges themselves for the first few years and might also have to increase the period of education by one year, but later on, when Arabic becomes compulsory in our educational system, Arabic-knowing students for our law colleges will be easily available.

(2) Along with the teaching of Arabic, the students must also be made to study the Qur'an and the *Hadith* before begining their education in Law so that they become capable of understanding the spirit and the broad outlines of the system of life envisaged by

Islam. Our theological institutions have been following since long the wrong method of beginning their education with *Fiqh*. In these institutions, the followers of the various schools of thought teach *Hadith* according to the viewpoint of their particular school. One or two longer chapters of the Qur'an are included in the curriculum just as a sacred relic and even in the study of these chapters, only the literary beauties of the Qur'an are stressed. The result is that although graduates from these institutions are well aware of many particulars and details of the Islamic Law, they are not fully conversant with the real spirit, the ideals and the over-all system of Islam, which these laws seek to safeguard. Sometimes they do not even know the relation between *Din* and *Shari'ah*, on the one hand and between the *Shari'ah* and the problems of *Fiqh* on the other.* The result of this type of education is that most of these people believe as if the minute details of law and the doctrines stressed by or peculiar to their own school of thought alone are the real essence of religion. And it is this error that has created sectarian controversies and bigotry among the Muslims. Again, as a result of this some of the basic objectives of the *Shari'ah* have sometimes been overlooked in applying the rules of *Fiqh* to the problems of everyday life. We wish this situation to come to an end. A stu-

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* For a discussion of the difference between *Din* and *Shari'ah* See : Abul A'la Maududi, *Towards Understanding Islam*. Tr. and ed. Khurshid Ahmad, Islamic Publications Ltd., Lahore, 1960, pp 152-55.

dent must acquire an understanding of Islam as a system through a study of the Qur'an and the *Hadith* before he begins the study of *Fiqh*.

We will, no doubt, be confronted with difficulties for the first few years because we will not get graduates with good knowledge of the Qur'an and *Hadith* and hence we might have to start classes of the Qur'an and *Hadith* as well in the law colleges. But gradually, as our general educational reforms will bear fruit, we will be able to lay down the condition that only those students who had *Tafsir* (Interpretation of the Qur'an) and *Hadith* in degree classes as their optional subjects will be eligible for admission to law colleges or else they will have to spend an extra year to study these subjects.

(3) The curricula of law colleges must necessarily include the following three subjects : (*a*) Principles of Islamic Jurisprudence as well as of Modern Jurisprudence ; (*b*) History of Islamic Jurisprudence ; and (*c*) *Fiqh*, *i.e.*, an un-prejudiced study of *all* the major schools of *Fiqh*. Without mastering these three subjects, the students can neither gain a complete understanding of *Fiqh* nor can they develop those qualities of sound reasoning which are a pre-requisite for becoming good lawyers and jurists. They cannot also become experts in law, capable of framing new rules and regulations for our progressive state and capable of employing the correct modes of interpretation and analogous reasoning. Without that they cannot pronounce judgments of the standard, clarity, vision, and depth evinced by the legists of the past. And if the judgments of our

modern legists lack in these respects, they will never be able to command respect and wholesome approval of the people. Not only that, without fully understanding the principles of their own law, they cannot apply them to the new problems which will be cropping up every day and will be creating altogether new situations. It is only the history of *Fiqh* which reveals the evolution of Islamic law and also points out the lines along which this law can develop in future. Consequently, unless the students of law are fully conversant with all the important contributions of the scholars of the past, they cannot benefit from other schools of *Fiqh* in cases where they are unable to solve a certain problem with the help of the approach and literature of some particular school. This is essential also because they should as a rule make use of this guidance and get assistance from the works of the past before making an independent effort and pronouncing a final judgment. It is for these reasons that I consider the inclusion of the above-mentioned three subjects essential in the list of compulsory subjects in the curricula of our law colleges.

(4) Along with reforming the curricula of legal education we will also have to give due importance to the moral training and chatacter-building of the students. From the Islamic point of view, the law colleges should not serve as factories for producing unconscientious lawyers, unscrupulous magistrates and unjust judges ; on the contrary, they should produce lawyers and jurists of high moral stature, of unimpeachable integrity and strength of character. They should be the living emblems of honesty, fairness and justice.

Of all professions, the dispensation of justice requires the highest degree of piety, the acutest sense of responsibility and the greatest measure of the fear of God. Graduates from our law colleges must, therefore, be persons fit to take the place of such luminaries of our history like Qadi Shurayh, Imam Abu Hanifah, Imam Malik, Imam Ahmad Ibn Hanbal, Imam Shafe'i and Qadi Abu Yusuf. These colleges must produce persons of strong and dependable character who, while deciding a case in the light of the *Shari'ah*, have their eyes, fixed on God and are not at all swayed by greed, fear, personal interest or individual likes and dislikes and who may not deviate from what they believe and know to be right out of any consideration whatsoever.

(D) Reform of Judicial System

In order to prepare the ground for the enforcement of Islamic law, we will have to introduce many reforms in our judicial system also. Leaving aside other less important factors, I will mention only two of them which are most important from the Islamic point of view.

(1) The first problem which deserves attention is the legal profession which is one of the worst and probably the greatest banes of the present judicial system. From the moral point of view not a single argument can be put forward in its favour and, in the practical field, there is not a single genuine requirement of court procedure for which a better alternative cannot be provided for. This profession stands in such contrast with the principles of Islam that as long as it exists, it

would be extremely difficult to enforce the Islamic law in its real spirit. Moreover, if the same jugglery is practised with the Law of God as is being practised day in and day out with the man-made law, that may not only deprive us of justice but may also rob us of our faith. It is, therefore, imperative that this profession in its present form is gradually abolished.

Theoretically speaking, the task of the lawyer is to help the court in understanding the law and applying it to the case under trial. In principle, such a need cannot be denied. It can also be accepted that two experts of law may hold different opinions regarding the same case. It is also possible that in the opinion of one of the experts the case of a certain party may be stronger than that of the other and *vice versa*. Thus, in order to arrive at a sound judgment, it may be useful for the court to know and hear the arguments put forward on behalf of both the parties. But the question is : Are these ends achieved in actual practice and does this profession really meet this just requirement ?

Actually, the situation is very different. A person possessing legal knowledge and insight sells his services in the market. Such a person is always ready to think out and produce legal points in favour of the highest bidder, irrespective of the merits of the case. Thus a lawyer is not at all concerned whether his client is in the right or in the wrong, whether he has committed a crime or is innocent, whether he wishes to get what is rightfully due to him or wants to encroach upon the rights of others. Again, a lawyer has also no concern

with the spirit and the real object of the law itself and whether, in that sense the case of his client is just or unjust. What concerns him is that a certain person has paid him his fees for pleading the case on his behalf. Consequently, he prepares the case and gives it a legal shape. He hides its weaker points, plays up the favourable ones and picks out from the facts of the case and from the evidence only such points as strengthen the side taken by him. He also tries to influence and confuse the witnesses so that the actual facts of the case—if they go against his client—remain in the dark or at least become doubtful. It is the supposed duty of a lawyer to put forward only such interpretations of the law as serve his client's purpose and to strengthen it by referring to legal precedents. *Thus, he tries, in a way, to mislead the judge and circumvent the process of justice.* All this is done only to extract from the judge a judgment which is in favour of his client, and not the one which is desirable from the point of view of justice.

A lawyer does not worry at all whether a criminal is being acquitted or an innocent person is being convicted, whether a person loses his right or usurps someone else's. It is not his business to support truth and uphold a just cause. He is not there to have justice done ; his sole aim is money ! For him, anyone prepared to pay the highest amount is always in the right. Can a legal profession of such a nature be declared right and just if we have even the least regard for Islam? Can any man with moral values, a healthy conscience and the fear of God, take such an awful responsibility

upon himself as to have a wronged man deprived of justice and to see that the wrong-doer continues to enjoy the fruit of his wickedness ? And can the advice of such legal experts who are paid to present a one-sided picture be of any help to the court in deciding a case *justly* ? Who can believe that the difference of opinion in the interpretation of the lawyers "hired" by opposing parties, can reasonably be honest and genuine ? Surely, both of them would have put forward just the contrary arguments with the same vehemence, had their clients been exchanged between them.

It is, therefore, apparent that incalculabe disservice has been done to the cause of law and justice by making law a profession. It has given premium to the violation rather than the observance of law. It has corroded the entire collective life and has made our politics extremely dirty. In fact it is during the law-yer's educational life itself that the seeds of an immoral attitude are sown. College debates make them habituated to speak against their convictions. The real qualification of a good debator is considered to be his capacity to speak with the same vigour and eloquence both for and against a proposition, regardless of his personal views. The edge of his proficiency in speaking and arguing against truth is further sharpened during the course of his practice in law and he becomes perfect in using his mind and his tongue against the dictates of his conscience. Then, this malady does not stop here When these people, with this motheaten character, enter the arena of public life and politics, they poison

the academic, cultural and political life of the whole nation.

Islam is in no way prepared to tolerate such an ugly state of affairs, and there is no place within its legal and judicial structure for this profession, as it is prevalent now-a-days ; for in its present form it is quite contrary to the spirit and traditions of Islam. Muslims have ruled almost half the then known world during the last ten or twelve centuries but one cannot find even a trace of the legal profession in their judicial system. On the contary, the *muftis* of the past had always had independent means of livelihood and used to render the service of issuing *edicts* and helping the courts in the elucidation of points of law, *gratis*. In view of the increased needs of our time, we can permanently engage the required number of legal experts including specialists in different branches of Law in cities, towns and villages, and give them reasonable salaries from the Government exchequer. But every effort should be made to keep them immune from any obligation to any of the contending parties. The approach to them by any of the parties to a case should be prohibited and none of them should be allowed to render any "service" to them in any form, thus keeping them all the time completely immune from every type of pressure or allurement. Even the Government should not have the right of putting any pressure on them, just as it is not entitled to influence the opinion of the jndges. The courts can refer cases to them and solicit their opinion. If there is any difference of opinion, they can be asked to appear in the courts and argue their respective view-

points. During the proceedings of a case, besides the cross-examination of the witnesses by the court, these legal experts should also be entitled to extract facts from them which throw any light on the case. This will really help the courts in the correct interpretation and application of law. Honest differences of opinion among legal experts will still be there. But this will help in solving many a knotty legal problem; this will also save much of the time that is wasted due to the cleverly made-up cases and false evidence. And, above all, this will go a long way in effectively checking litigation which is so rampant in our society, mostly due to this legal profession.

There is, however, one important gap that we shall have to fill up in the absence of the lawyers. This concerns the preparation of the cases for presentation to the courts. This is a genuine necessity of the litigant public and without a proper machinery for this purpose they will not only themselves experience much inconvenience but also waste much of the valuable time of our courts and confuse them by putting up their cases in an irregular and incomplete form. A solution of this problem is that we may revive the old institution of "*Mukhtari*" which existed in the past and still continues in a deteriorated form in some parts of our country. Our law colleges should hold subsidiary classes to teach the procedural law to the people of average education and make them conversant with the practical aspects of the judicial business. The duty of such persons would be to give a legal shape to a case

so that it may be properly presented in a court of law. They would also instruct the parties regarding judicial procedure at the various stages of a case. These people may be allowed to charge fees for their services. This will not lead to the evils that we find in the present-day legal profession.

2. In order to make the country's judicial system conform to the Islamic standards, another important reform is needed, and that is the abolition of the court-fee. This is a pernicious innovation and we Muslims were not even acquainted with it before the domination of the Western political thought and values over us. It is foreign to the very spirit of Islam that our courts of law, instead of rendering the service of dispensing justice, should be turned into 'shops of law' whose doors are closed for the persons who are not in a position to pay the price of their services. This state of affairs is reminiscent of the British regime and now that foreign rule has come to an end, we feel that this evil should also go. We want to see our courts functioning on Islamic concepts, according to which dispensing of justice is not a 'business' but a religious duty of every Muslim and of their state most of all—a duty for which no fees should be charged.

One might say that if the court-fee is abolished, how will the expenses incurred on the judiciary be met? I wish to mention the following two points in this regard:

Firstly, under an Islamic dispensation the present heavy judicial establishment, rendered indispensable

by the current state of affairs, will no longer be necessary. Abolition of the lawyer's profession will also play its part in reducing litigation. Moreover, the duration of the cases will be considerably reduced. Social, economic and moral reforms will go a long way in curtailing the number of cases. Adequate training of police and jail officials and reforms in these departments will also indirectly contribute to reducing the number of crimes. Thus we will not be in need of as many judges and magistrates and as heavy a judicial establishment as we need at present, and, consequently, there will be quite a remarkable decrease in the expenditure of our judicial department. Besides that, in an Islamic state the scales of pay also will not be the same as they are today.

After all these reforms and other curtailments of expenditure, the burden of expenditure of the judiciary on our national exchequer will become much lighter and instead of imposing it on those who need and seek justice we can distribute it over those persons who go to the courts to serve their unjust ends or those who are greatly benefited by them. For instance, we can fine such persons who try to evade summons or file fictitious suits. The fine imposed upon criminals can also be used for the same purpose. Besides this, a person who gets a decree from a court worth more than a certain amount of money may be taxed according to a certain fixed rate. If, in spite of all this, the judicial department has a deficit balance of expenditure, the deficit can be met from the national exchequer, because to dispense justice among the people is, as has

been said earlier, one of the basic obligations of an Islamic state. If the exchequer bears the burden of police, education and health services, why should it not finance the administration of justice ?

The above are a few suggestions which, I think, must be put into practice in order to make the enforcement of Islamic Law possible in this country. I request the scholars and those who have practical experience in legal and judicial matters to thrash out these suggestions and try to supplement them wherever need be. In the meantime I hope that this explanation of mine will, to some extent, satisfy those who entertain the wrong notion that the enforcement of Islamic Law is not possible at present, and will make them understand that this work can be done. It will also enable them to have an idea of the ways and means of doing this important task. But the enforcement of the Islamic law requires primarily an urge—an irrepressible urge—to do the job. What we need is a group of people—a leadership—which is imbued with the spirit of Islam and which is determined to establish Islam, come what may. We all know that if a building has to be constructed, the objective cannot be achieved if the architects who *know* the design of the building and have the *will* to construct it and possess the *requisite resources*, are not available. On the other hand, if they are available, anything can be built—be it a temple or a mosque.